PRIVY COUNCIL REPORT

MALAYAN PLANT (PTE.) LTD. v. MOSCOW NARODNY BANK LTD.

[P.C. (Lord Wilberforce, Lord Edmund-Davies, Lord Fraser of Tulleybelton, Lord Scarman & Sir William Douglas) March 4-6 & May 8, 1980]

[Privy Council Appeal No. 30 of 1978]

Company Law — Winding-up — Debt due and owing — Discretion of judge — Appeal dismissed — Costs — Companies Act (Cap. 185), ss. 218 & 221.

Practice and Procedure — Appeal dismissed — Costs.

This was an appeal from the decision of the Court of Appeal, Singapore, reported in [1978] 2 M.L.J. 81, which had dismissed the appeal from the Chief Justice on a winding-up petition brought by the respondent bank. The respondent-bank had proved that the appellant was indebted to it and that the debt had not been paid. The learned Chief Justice had exercised his discretion and made the winding-up order.

Held: no misuse of the learned Chief Justice's discretion had been established and the Court of Appeal were right to say so. The appeal must therefore be dismissed.

Cases referred to:-

(1) *In re L.H.F. Wools* [1970] Ch. 27.
(2) *In re Great Britain Mutual Life Assurance Society* (1880) 16 Ch. D 246, 253.
(3) *Bowes* v. *Hope Life Insurance and Guarantee Co.* (1865) 11 H.L.C. 389, 402.
(4) *Ward* v. *James* [1966] 1 Q.B. 273, 295.
(5) *In re Westbourne Galleries Ltd.* [1973] A.C. 360, 374.
(6) *Cumming* v. *Shand* (1860) 5 H. & N. 95.
(7) *Buckingham* v. *L.M. Bank* (1895) 12 T.L.R. 70.
(8) *Woods* v. *Martins Bank* [1959] 1 Q.B. 55.
(9) *Odlum* v. *Vancouver City* (1915) 85 L.J. P.C. 95.
(10) *Short* v. *A.G. of Sierra Leone* [1963] 1 W.L.R. 1427, 1433.
(11) *Re Reprographic Exports (Euromat) Ltd.* (1978) 22 Sol. Jo. 400.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

John Newey Q.C. (*Ian Glick* with him) for the appellants.

Lai Kew Chai for the respondent.

Cur. Adv. Vult.

Lord Edmund-Davies (delivering the judgment of the Board): This is an appeal from a judgment of the Court of Appeal of the Republic of Singapore, who on April 14, 1978, dismissed the present appellants' appeal from an order of Wee Chong Jin C.J., made upon the respondents' petition, that the appellant Company be wound up.

The appellants were incorporated in Singapore on February 9, 1972, under the Companies Act (Cap. 185). The nominal capital was $10m., and the amount paid up or credited $1.77m. The respondents are a bank wholly owned by the Soviet Government, but incorporated in London and having a place of business in Singapore. From 1972 the respondents extended financial accommodation for the appellants' trading activities in three ways:

(1) overdraft facilities;
(2) credit facilities for the acquisition of goods, a trust receipt being issued in respect of each transaction and the goods and their proceeds of sale being held on trust for the respondents; and
(3) acceptance by the respondents of bills of exchange on the appellants' behalf.

By way of security, the appellants mortgaged their Singapore premises to the respondents and from 1974 onwards they also pledged their goods.

The appellants traded successfully for some time, and they understandably relied heavily in these proceedings on the fact that, as late as December 17, 1975, the respondents described them to a third party as "a valued customer of the Bank [who] has maintained a satisfactory account with us since October 2, 1972", and added "We estimate their net worth to be in the region of Singapore Dollars low eight figures and would consider the Company good for their commitments". But trading conditions deteriorated, and the respondents became concerned about the proceeds of sale of goods held by a number of trust receipts whose dates of maturity had expired. Correspondence passed between the parties and in December 1976, two meetings were held, at one of which Yap Cheng Hai (the appellants' Chairman and Managing Director) renewed his earlier promise of concrete proposals to repay moneys which the appellants claimed in respect of certain trust receipts. At the end of the first of these meetings the respondents' solicitors served upon Yap Cheng Hai a written demand for payment of $8,092,088.56 within three weeks from that date, failing which they would petition for a winding-up order. Nevertheless, at the second meeting on December 17, 1976, the respondents were met by nothing more than a promise to prepare what was called a "Schedule of Repayment". But, in the absence of any concrete proposals, on January 27, 1977, the respondents caused to be served on the appellants a statutory demand under section 218(2)(a) of the Act for payment within three weeks of the aforesaid sum together with 14% interest, failing which they would institute winding-up proceedings.

On February 21, 1977, the respondents presented their petition, based on section 218(1)(e) and section 218(2)(a) of the Companies Act asserting that the Company was unable to pay its debts and was so "deemed" (having neglected for three weeks after service upon them of the statutory demand "to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor",) and that in those circumstances it was just and equitable that the Company should be wound up.

No oral evidence was called when the learned Chief Justice dealt with the petition on May 12, 1977. Yap Cheng Hai had sworn an affidavit in opposition, asserting that on several grounds it would not be just or equitable to wind-up the Company. Foremost among these were the following:

That the company did not owe the petitioner the debts alleged or the interest claimed;

That it was a profit-making organisation; and

That it would be beneficial to all creditors were no order made.

The petition was supported by one creditor in the sum of $12,362.40 and opposed by another in the sum of $1,795,793.58. Having considered all the material, in-

cluding an affidavit filed on behalf of the petitioners, and the submission of counsel, the learned Chief Justice proceeded to make a winding-up order and appointed the Official Receiver as Provisional Liquidator.

From that order the company appealed, again asserting in general terms in their Petition of Appeal that their alleged indebtedness was disputed, and in particular that the learned Chief Justice had erred in arriving at the contrary conclusion. But when the appeal reached the Court of Appeal on March 22, 1978, it was expressly conceded that the Company owed the Bank the full amount of $8,092,088.96 with 14% interest, and the sole ground of appeal persisted in was that it would be neither just nor equitable to allow the winding-up order to remain. Reliance was sought to be placed on the fact that the relationship of bank to customer had existed between the parties for over five years. It was said that this had involved the former in making large advances which had enabled the latter to trade successfully and to have assets exceeding their liabilities, that there was no possibility of the Company finding an alternative source of finance at short notice, and that the demands in December 1976 and January 1977 for repayment within 3 weeks of all outstanding loans and advances had placed the Company in an impossible situation which had resulted from their refusal to accede to the bank's persuasion that they should trade in Russian goods. The Court of Appeal summarised the Company's plea by saying that it had, in effect, asserted,

"That the Bank's general behaviour in this matter was not that of a good and reasonable banker, *vis-à-vis* its customer, in that it had made it too easy for the Company to become indebted to it in the sum of over $8 million and, worse still, to ask the Company to pay off the debt in three weeks, in one lump sum."

Holding that it was clear that the Company were unable to pay its debts and that it was just and equitable to make a winding-up order, the Court of Appeal declined to interfere with the learned Chief Justice's exercise of his discretion and dismissed the appeal.

Before this Board Mr. John Newey Q.C., has repeated his submission made in the Court of Appeal that the source of error has throughout been that the Chief Justice had exercised his discretion according to what counsel described as "the Buckley concept", whereas he should have adopted "the modern concept as propounded by the Court of Appeal in *In re L.H.F. Wools Ltd.*"[1]

It is not entirely easy to see how the petitioner's case was presented at first instance, save that it was submitted that it would be more beneficial to all creditors if there were *no* winding-up. The learned Chief Justice's notes disclose that his attention was drawn to the observations of Jessel M.R. in *In re Great Britain Mutual Life Assurance Society,*[2] at 253 that,

"... it is not sufficient for the respondents, upon a petition of this kind, to say, 'We dispute the claim'. They must bring forward a *prima facie* case which satisfies the court that there is something which ought to be tried...."

There was also cited to the Chief Justice a passage from *Buckley* on the Companies Act, 13th edition, at page 460, dealing with "commercial insolvency, that is, of the company being unable to meet current demands upon it", and containing the following observations, which are, in the opinion of the Board, impeccable:

"In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up."

But the appellants' counsel referred the Board to an earlier passage (*not* referred to in the Chief Justice's notes) which he said contained what he described as "the Buckley concept". It is to be found at page 450, and is in these words:

"A creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the Act. He is not bound to give time. And, notwithstanding a voluntary winding up, on proving his debt and that it remains unsatisfied he will be so entitled.

It is not a discretionary matter with the court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it but, ordinarily speaking, it is the duty of the court to direct the winding up."

The citation is from Lord Cranworth's speech in *Bowes* v. *Hope Life Insurance and Guarantee Co.*[3] at page 402, and appellants' counsel criticised it as being both too rigid and too narrow. It was contrasted with what he submitted was the preferable (or "modern") approach adopted in the *Wools* case, *ante*, where, however, Edmund-Davies L.J. stressed (at page 41) what he described as the "important qualifying words" with which Lord Cranworth had rounded off his observations, and commented,

"*Accordingly,* we come to the position that whether or not an order should be made... is a matter of discretion."

In the *Wools* case the company being sought to be wound up had against the petitioner a cross-claim which was awaiting litigation in Belgium. It had a substantial chance of succeeding there and would, in the words of Harman L.J. (page 35H)

"overtop the [petitioner's] debt and wipe it out altogether."

Furthermore, the cross-claim was the solitary asset of the company. The Court of Appeal held that, in the light of all these circumstances, the learned trial judge should have stayed the hearing of the winding-up petition, and cited with approval the following observations of Lord Denning M.R. in *Ward* v. *James*[4]:

"... the courts have laid down considerations to guide judges in the exercise of their discretion, and these considerations have been changed from time to time as the years go by. They change as public policy demands.... The cases all show that, when a statute gives discretion, the court must not fetter it by rigid rules from which a judge is never at liberty to depart."

If it is permissible to say so, the *Wools* case made no new law and it is not particularly "modern" in its approach. It may be that the decision served a useful purpose in underlining yet again that section 225(1) of the Companies Act, 1948 — which is similar to section 221(1) of the Singapore Act — serves to vest in the court a wide discretion. Regard must, therefore, always be had to the statutory provision itself, for, as Lord Wilberforce said in *In re Westbourne Galleries Ltd.*[5] at page 374H,

"Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances." There is no distinction in principle between a cross-claim of substance (such as in the *Wools* case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding-up petition.

There are, of course, other grounds which, consonant with the statutory provisions, may lead the court to the same conclusion. Do any such exist in the present case? Mr. Newey relied strongly on what he described as the indefensible conduct of the petitioning Bank, to which reference has already been made. But no evidence of oppression or unfairness by the Bank was adduced, and it has to be said that, upon the available material, it is difficult to see in what respect their conduct is open to legitimate criticism. It may be, for all one knows, that they could well have extended some indulgence to the Company, but they were under no obligation to do more in that way than they had already done, and it cannot be said that they were either unjust or inequitable in failing to do so. At one stage learned counsel appeared to submit that it was an implied term of their relationship that the respondents should from time to time have advised the appellants on the prudent managing of their business, but he later disclaimed that anything of the sort was being suggested. And the relevant facts are widely different from those in the cases cited by Mr. Newey where a bank was in one respect or another held not to have measured up to their duty to their customer — for example, *Cumming* v. *Shand*,[6] which turned on a particular course of dealing between the parties and not simply on the banker/customer relationship; or *Buckingham* v. *L.M. Bank*,[7] where a bank closed the customer's account without proper notice; or *Woods* v. *Martins Bank*[8] where a bank manager whose advice was sought by a customer gave grossly negligent information regarding a company's stability. At the end of the day, beyond observing that to give the statutory notice demanding payment within three weeks was to ask the impossible, no concrete criticism of the respondent's conduct was advanced by learned counsel.

The Board considers that two further comments should be made on this aspect of the appeal. In the first place, no such criticism was ventilated before the learned Chief Justice, and it is (at best) highly questionable whether the manner of exercising his discretion can properly and fairly be criticised on the ground that he failed to have regard to considerations (of a somewhat special nature) which it was never suggested that he ought to have in mind. And, secondly, it needs to be pointed out that at *no* stage before presentation of the petition did the appellants advance any suggestion to the respondents as to how and when they proposed to extricate themselves from their financial difficulties. They were equally reticent on this matter both when before the Chief Justice and in the Court of Appeal. Hitherto they have contended simply that the petition should be dismissed out of hand, but such a conclusion is manifestly unthinkable on the facts. When it was being submitted to the Board that the learned Chief Justice might have acted differently had he not been under the misapprehension (as it was put) that he had only a narrow discretion, one could reasonably have expected that even at that late hour the appellants would have advanced some concrete proposals. But nothing was forthcoming save that, upon the direct question being put by the Board, learned counsel could reply only that the appellants would have liked a twelvemonth to deal with their affairs.

It is solely with the exercise of discretion by the learned Chief Justice that this appeal is concerned. It is nevertheless important to have in mind that the manner in which he exercised it was in due course upheld by the Court of Appeal in Singapore. It has long been the practice of this Board not to interfere unless it is satisfied that a "discretion has been obviously misused" (*Odlum* v. *Vancouver City*,[9] *per* Lord Dunedin at page 98), and unless "the Board is fully satisfied that the exercise of the discretion has effected a substantial injustice to one or other of the parties" (*Short* v. *A.G. of Sierra Leone*,[10] *per* Lord Evershed at page 1433). Mr. Newey's valiant attempt to persuade the Board that such is the case here has resembled the desperate efforts of one seeking to make bricks without straw. In their Lordships' judgment no misuse of the learned Chief Justice's discretion has been established, and the Court of Appeal were right to say so. It follows that the appeal must be dismissed.

In all the circumstances, it is considered that the proper order as to costs should, in conformity with that made in *Re Reprographic Exports (Euromat) Ltd.*,[11] be that all costs incurred by the appellants after the matter had been disposed of by the learned Chief Justice should be paid out of the appellant Company's assets only after the claims of all unsecured creditors have been fully discharged. The costs of the respondents will, of course, be paid out of the company assets in the ordinary way.

Appeal dismissed.

Solicitors: *Kingsford Dorman; Coward Chance.*